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No. 704.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

MONARCH DISTRIBUTING COMPANY, a Corporation, and JOSEPH S. MEYER, Petitioners,

v.

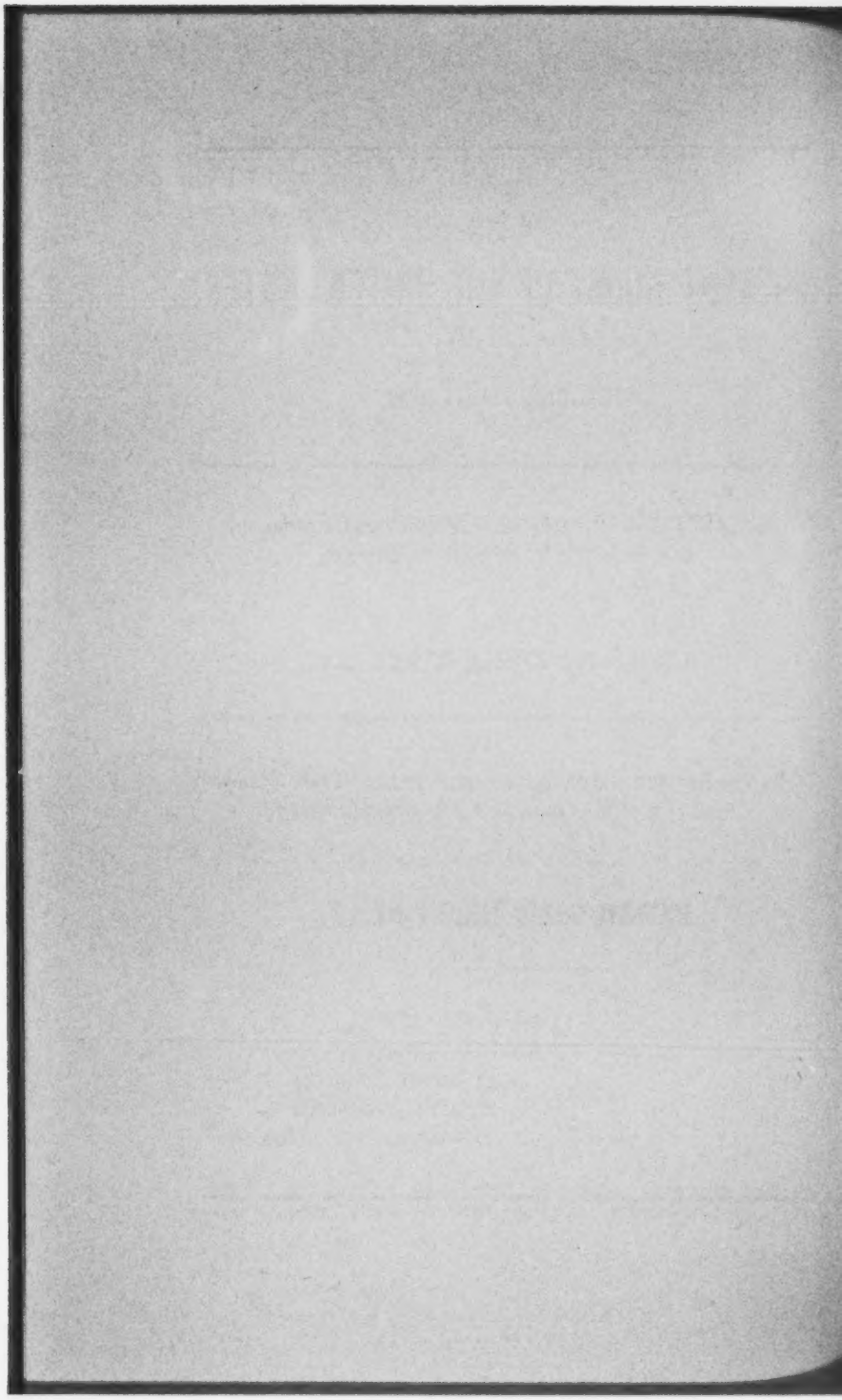
THE UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITIONERS' REPLY BRIEF.

JOHN M. KARNS,
HAROLD J. BANDY,
602 Spivey Building,
East St. Louis, Illinois,
Attorneys for Petitioners.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.



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The convictions of petitioners were affirmed only as to counts 1 and 6 of indictment 15126 and counts 1 to 3, inclusive, of indictment 15129. These counts attempt to charge violations of U. S. C. A., Title 26, Section 1208. This statute relates only to rectifiers and wholesale liquor dealers. Only rectifiers and wholesale liquor dealers are subject to the provisions of this statute. Unless a defendant falls within the classification (rectifier or wholesale liquor

dealer), created by this statute, he cannot be prosecuted for violation of it. The statute does not apply to an official, agent or employee of a rectifier or wholesale liquor dealer. The penal section says:

> "Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary, or to make entries therein, or cancels, alters, or obliterates any entry therein, or hinders or obstructs any Internal Revenue officer from inspecting such records or neglects or refuses to preserve or produce such records as required by this chapter or by regulations issued pursuant thereto, shall pay a penalty of one hundred and no/100 ($100.00) dollars, and, on conviction, shall be fined not less than one hundred and no/100 ($100.00) dollars, nor more than five thousand and no/100 ($5,000.00) dollars, and be imprisoned not less than three months nor more than three years."

The counts under which these convictions were affirmed do not charge that petitioner Joseph S. Meyer was either a rectifier or a wholesale liquor dealer. Moreover, **the evidence shows that Meyer was not a rectifier or wholesale liquor dealer.** The evidence shows that he was at one time an employee of Monarch Distributing Company, later vice-president of the company, and afterwards president (R. pp. 388 and 389).

The statute under which these convictions have been affirmed (Title 26, Section 1208) does not provide for the prosecution or punishment of an official, agent or employee of a rectifier or wholesale liquor dealer, and the statute cannot be enlarged to include officials or employees.

Only under a charge of aiding and assisting Monarch Distributing Company in falsifying records required to be kept by a wholesale liquor dealer could Meyer be prose-

cuted (U. S. C. A., Title 26, Section 1693). Counts 8, 9, 10 and 11 of indictment 15126 charge petitioners with violation of said aiding and assisting statute. They charge petitioners with willfully and feloniously aiding and assisting in the preparation of a certain false and fraudulent document in connection with a matter arising under the Internal Revenue Laws of the United States of America, to wit: a certain wholesale liquor dealer's monthly report. These counts charge violation of U. S. C. A., Title 26, Section 1693, which provides, among other things, that

> "any person who willfully aids or assists in, or procures, counsels or advises the preparation or presentation under, or in connection with any matter arising under the Internal Revenue Laws, of a false or fraudulent return, affidavit, claim or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document), be guilty of a felony, and, upon conviction thereof, be fined not more than ten thousand and no/100 ($10,000.00) dollars or imprisoned for not more than five years, or both, together with the costs of prosecution."

The conviction of petitioner Joseph S. Meyer was not affirmed under counts 8, 9, 10 and 11 of indictment 15126. The Court merely considered the evidence under counts 1 and 6, and, inasmuch as the punishment assessed did not exceed the maximum that could have been imposed under either count 1 or count 6, refused to consider the other counts of the indictment (116 F. [2nd] 11).

Not only does the indictment wholly fail to allege that Meyer was a wholesale liquor dealer and therefore amenable to the statute under which the convictions have been affirmed, but there is a total failure of proof to show that he was a wholesale liquor dealer. It is provided by Section

3 (c) (1) of the Federal Alcohol Administration Act [U. S. C. A., Title 27, Section 203 (c) (1)]: "It shall be unalwful, except pursuant to a basic permit issued under this Chapter by the Administrator, (1) to engage in the business of purchasing for resale at wholesale distilled spirits, wine or malt beverages." Sections 4 (a) (1) and 4 (a) (2) of the Federal Alcohol Administration Act [U. S. C. A., Title 27, Section 204 (a) (1) (2)] specifies the persons to whom a federal wholesale liquor dealer's basic permit may be issued. The evidence in this case fails to show that petitioner Meyer was the holder of a wholesaler's basic permit. It fails to show that he was a wholesale liquor dealer. There is no evidence in the record that even infers that he was within that class. The only evidence appearing in the record is that he began as an employee of Monarch Distributing Company, later became vice-president of the company and afterwards president (R. p. 388). The statute under which these convictions have been affirmed does not apply to an official or employee of a wholesale liquor dealer. There is total failure of proof in this record to sustain the conviction of Meyer.

It is respectfully and earnestly contended that the conviction of petitioner Meyer is erroneous because:

(1) The indictment fails to charge that he was either a rectifier or wholesale liquor dealer.

(2) The uncontradicted evidence clearly shows that he was not a member of either class.

Moreover, the counts of the indictments which have been affirmed as to petitioner Monarch Distributing Company are fatally defective because they fail to allege that the corporation was a wholesale liquor dealer. In their brief counsel for respondents say: "The records in which the alleged false entries were made were introduced in evi-

dence and, as heretofore stated, they disclosed that they were the records of wholesale liquor dealers, and that the spirits involved were distilled spirits." In other words, respondent contends the indictment has been bolstered by the proof. If this statement is correct all vital omissions in an indictment could be supplied by proof at the trial. The entire indictment could be dispensed with.

Of course, this contention is not correct. The Sixth Amendment to the Constitution guarantees that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

The indictment must allege all of the essential ingredients of the statute under which it is drawn, and failure to incorporate necessary allegations in the indictment cannot be supplemented by proof at the trial. Fatal omissions in an indictment cannot be supplied either by bill of particulars or proof. The quoted statement from respondent's brief does not answer our contention that the indictments are fatally defective. It merely says that proof concerning the records was offered at the trial.

Respondent relies upon the case of Hewitt v. U. S., 110 F. (2nd) 1, and says that this case overrules Shaw v. U. S., 292 F. 339, cited and relied upon by petitioners in support of their contention that the counts upon which these convictions have been affirmed are fatally defective. An examination of the Hewitt case, supra, shows that it is not applicable here, and that it does not overrule the decision in the Shaw case. Instead of alleging that the bank which defendants in the Hewitt case robbed was a state bank, the deposits of which were insured by the Federal Deposit Insurance Corporation of the United States, the indictment alleged that the bank was a member of the Federal De-

posit Insurance Company of the United States. The Court properly held that this was merely a formal defect, not prejudicial to the defendants, because the indictment sufficiently apprised the defendants that they were charged with robbing a bank, the deposits of which were insured by the F. D. I. C. of the United States. The Court, in the Hewitt opinion, further said: "The complete omission of any allegation which might reasonably be construed to mean that the bank was so insured would be fatal under the rule announced in Shaw v. U. S., 292 F. 339."

In this case the counts under which conviction of petitioners was affirmed wholly fail and omit to allege that petitioners (or either petitioner) were wholesale liquor dealers. These counts wholly fail to bring petitioners within the class created by the statute. This was true in the Shaw case, 292 F. 339, in which case the Court held the indictment to be fatally defective.

Respondent relies upon the allegation contained in these counts to the effect that the defendants unlawfully, etc., did make a certain false entry on a certain record required to be kept by Monarch Distributing Company, which "purported to constitute the monthly report, or portion of the monthly report, of a wholesale liquor dealer" (R. p. 3).

The allegation that Monarch Distributing Company was required to keep certain records consisting of the monthly report of a wholesale liquor dealer is a bare conclusion. Petitioner was not required to keep such a record unless it was either a rectifier or a wholesale liquor dealer.

It was mandatory for the indictment to allege that petitioners were wholesale liquor dealers in order to bring them within the condemnation of the statute, and the failure of the counts to contain this necessary allegation con-

stitutes a fatal defect that requires reversal of the convictions.

For the reasons herein expressed, petitioners once more respectfully submit that the writ of certiorari should issue, directed to the United States Circuit Court of Appeals for tthe Seventh Circuit.

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HAROLD J. BANDY,
602 Spivey Building,
East St. Louis, Illinois,
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